

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

NELSON GARCIA, JR.,

Petitioner,

v.

Case No. 20-CV-336

BRIAN FOSTER,

Respondent.

RULE 4 ORDER

Nelson Garcia, Jr., who is currently incarcerated at the Waupun Correctional Institution, seeks a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Docket # 1.) Garcia challenges his judgment of conviction in Milwaukee County Case No. 2012CF104 for robbery of a financial institution. (*Id.* at 2.) Garcia alleges that his conviction and sentence are unconstitutional.

Garcia has paid the \$5.00 filing fee and his petition is ready for screening in accordance with Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, I must dismiss a petition summarily if “it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” During this initial review, I determine whether the petitioner has set forth cognizable constitutional or federal law claims and exhausted available state remedies.

Garcia alleges that he was denied the right to counsel during a lineup that occurred after a post-arrest probable cause hearing, and denied the right to represent himself at trial. (Docket # 1 at 6–7.) It appears Garcia has exhausted all available state court remedies. (*Id.* at

3.) As Garcia's petition sets forth cognizable constitutional claims and he appears to have exhausted his state court remedies, summary dismissal under Rule 4 is not appropriate and the respondent will be called upon to serve and file an answer, motion, or other response to the petition for a writ of habeas corpus.

NOW, THEREFORE, IT IS HEREBY ORDERED that a copy of Garcia's petition and this order shall be served upon the respondent by service upon the State of Wisconsin Attorney General.

IT IS FURTHER ORDERED THAT the respondent is directed to serve and file an answer, motion, or other response to the petition, complying with Rule 5 of the Rules Governing Habeas Corpus Cases, within **SIXTY (60)** days of the date of this order.

IT IS FURTHER ORDERED THAT unless the respondent files a dispositive motion in lieu of an answer, the parties shall abide by the following schedule regarding the filing of briefs on the merits of the petitioner's claim:

1. The petitioner shall have **forty-five (45)** days following the filing of the respondent's answer within which to file his brief in support of his petition;

2. The respondent shall have **forty-five (45)** days following the filing of the petitioner's brief within which to file a brief in opposition. If petitioner does not file a brief, the respondent has forty-five (45) days from the due date of the petitioner's brief to file his brief; and

3. The petitioner shall have **thirty (30)** days following the filing of the respondent's opposition brief within which to file a reply brief, if any.

In the event that respondent files a dispositive motion and supporting brief in lieu of an answer, this briefing schedule will be suspended and the briefing schedule will be as follows:

1. The petitioner shall have **forty-five (45) days** following the filing of the respondent's dispositive motion and supporting initial brief within which to file a brief in opposition;

2. The respondent shall have **thirty (30) days** following the filing of the petitioner's opposition brief within which to file a reply brief, if any.

Pursuant to Civil L.R. 7(f), the following page limitations apply: briefs in support of or in opposition to the habeas petition or a dispositive motion filed by the respondent must not exceed thirty (30) pages and reply briefs must not exceed fifteen (15) pages, not counting any statements of facts, exhibits, and affidavits.

Dated at Milwaukee, Wisconsin this 4th day of March, 2020.

BY THE COURT

s/Nancy Joseph
NANCY JOSEPH
United States Magistrate Judge